IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TENREC, INC., et al.,	)	
	)	
Plaintiffs,	)	3:16-cv-00995-SI
	)	
vs.	)	September 14, 2016
	)	
U.S. CITIZENSHIP AND IMMIGRATION SERVICES, et al.,	)	Portland, Oregon
	)	
Defendants.	)	

(Telephone Conference)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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(September 14, 2016)

P R O C E E D I N G S

(In chambers; telephone conference:)

MR. PRESS: Your Honor, this is the time set for a telephone Rule 16 conference and oral argument on a motion to dismiss defendants' motion to dismiss, 14, in civil case 16-cv-995-SI, Tenrec, Inc., et al., versus U.S. Citizenship and Immigration Services. Counsel, there is a court reporter present, so please be sure to state your name before you speak.

Here is Judge Simon.

THE COURT: Good afternoon, everyone. I have read the motion to dismiss the response and the reply. I've also read the four declarations that plaintiffs filed September 8th. I am eager to hear your arguments. But before we dive into the arguments, will someone clearly explain to me the difference in how these visa petitions were handled before and after the 2008 change. Maybe the right way to do that is ask Mr. Renison to tell me his understanding and then to see whether Mr. Press wants to add anything to that explanation.

Mr. Renison.

MR. RENISON: Yes, Your Honor. Thank you.

So before and after the regulation -- before the regulation, there was a series of regulations, which I reproduced as exhibits to the motion for summary judgment, which basically began about in 1992 is the first regulation.

At that time the agency decided in its regulation to reject petitions that were filed during the fiscal year, which perhaps at the end of the year they hadn't received during that fiscal year and approved enough cases that they just said, "Well, just resubmit these in the next fiscal year," instead of assigning a priority date to them.

At no time until, I think the first year was 2006 or 2007, at no time before that, let's say the 2007 date was there a point at which visas -- there were more visa petitions filed in a given several-day period than were available in the entire year. So during the 2001 time period they increased the numbers temporarily to 195,000, which alleviated the issue of not having enough numbers for the number of petitioners. But then that was a sunsetting provision that went away.

So there were two lotteries conducted in 2007 and '08, and, Mr. Press, correct me, but I believe it was 2007-2008 -- it was the 2006-2007 fiscal year, but then there were numbers available because less people started filing when the recession hit. So some of those people who missed out on the lottery, they just refiled, and they got a number. It was only in 2013 that the number of petitions then again was greater in a five-day filing window than the number of petitions available for the entire fiscal year, and it has been that way ever since -- 2013, 2014, 2015, 2016 -- and that is where it is now, and I don't know if that's a sufficient enough

explanation of the history of the regulations.

THE COURT: You know, it's my fault. I didn't phrase the question clearly. I just really want to know the change. What was the effect of the change of the 2008 regulation? So in other words, how were things processed immediately prior to that regulation and how were things processed after? So I apologize for not being clear.

Mr. Press, can you help me.

MR. PRESS: Yes, Your Honor, this is Mr. Press. It is our understanding that essentially prior to the regulations, the applications would be accepted, and given that, as Mr. Renison explained, there was not usually, at least, undue pressure on the system that they would normally not exceed the allotment, the congressional caps. They would take them and process them.

There was not necessarily a line, as Mr. Renison is arguing for, but they would process them. Once that became a problem, i.e., once the cap started to get hit, taking those applications in the order that they were received started to become grossly unfair in the sense of -- for example, the USCIS' mailroom has to actually process these, put them in an order. Now, I think Your Honor can imagine that when the postal service delivers applications in envelopes, and they literally drop the bag and certain envelopes fall on top and other envelopes fall on the bottom, that is pretty unfair to

treat those on the bottom arbitrarily and say, "Well, they are after the cap now, so I guess they are out of luck." So that is why essentially the randomized process with the lottery was created, to not have that sort of unfair arbitrary disparity between all of these applications coming in at once.

THE COURT: And that was the lottery that was created by the regulations in 2008?

MR. PRESS: Yes, Your Honor.

THE COURT: Okay. Thank you very much.

All right. I have read all of the briefs, but to the extent that defendants would now like to further argue their motion to dismiss, you're welcome to do so.

MR. PRESS: Mr. Renison, since it is my motion, I would like to begin.

THE COURT: Yes. I invited defendants to do so. I apologize for not being clear. So, yes, defendants may argue their motion.

MR. PRESS: Thank you, Your Honor.

As Your Honor instructed with its order yesterday regarding the statute of limitations argument, and specifically the Ninth Circuit, Judge Fisher's recent decision in Perez-Guzman v. Lynch, we would like to withdraw our arguments regarding statute of limitations. It is our understanding, and plaintiffs' counsel can correct me if I'm wrong, but it is our understanding based on the briefing and our reading of the

complaint that they are pursuing a substantive claim against the alleged violations of their clients' rights under the statute rather than a procedural claim as would be covered under the Ninth Circuit case law as described in Perez-Guzman.

THE COURT: That's my understanding too.

Mr. Renison, I take it you agree?

MR. RENISON: I agree.

MR. PRESS: Okay.

THE COURT: All right. Very good. Let's move on to the other arguments.

MR. PRESS: Thank you, Your Honor.

Despite our all being in agreement on the statute of limitations concern, we do have genuine concerns regarding the factual sufficiency included within the complaint as currently written.

THE COURT: By the way, let me interrupt you there if I may. One of the things that I'm already planning on doing is treating the four declarations as supplementing the complaint because obviously if I were to allow leave to replead to add the contents of those four declarations, we now know that plaintiffs can in good faith and consistent with Rule 11 add essentially the allegations in those four declarations to the complaint. So to get right to the substance of it, I'm going to treat the four declarations plus the complaint combined as essentially the allegations that plaintiff has pled.

MR. PRESS: Understood, Your Honor. That actually does make sense to us. We note, however, that there is still a deficiency with that proposed solution, based on the language in the declaration, this goes to the redressability argument that we make in our motion to dismiss and that we discuss in the reply as well, of course, with respect to whether the individual plaintiffs have standing, specifically zone-of-interest standing, to pursue their claims rather than any organizational plaintiffs.

If Your Honor would allow to begin with the zone-of-interest argument first and then I can proceed with the justiciability argument, whichever you prefer.

THE COURT: Whatever you prefer. I understand both of the issues, so whatever you prefer.

MR. PRESS: Okay. Thank you.

Let's start with the zone-of-interest standing. Although we do believe there are good arguments regarding deficiencies with the individual plaintiffs pursuing these claims, constitutional deficiencies, in that it is not clear that they're actually -- being non-immigrant workers do have any sort of constitutional right or cognizable right to pursue these claims rather than petition the company themselves, with respect to the zone of interest, we think that's an even stronger argument.

If you look at the statutory concerns with what went

into creating this system and specifically the caps, if you look at other case law out there treating non-immigrant workers such as the individual plaintiffs in this case, it is quite clear -- and the case law is fairly uniform that non-immigrant workers do not fall within the zone of interest. Instead the immigrant workers were people who were here as long-term permanent residents. Those are different cases and are distinguished in this case because what the plaintiffs are arguing for here -- the individual plaintiffs more specifically. If you look at declarations, they want to work for these companies. They want to work for money, but that in itself creates a problem because when they work for money here in the United States, they are taking jobs away from American workers.

Specifically there is a lot of case law out there, including very recent case law from the District of Columbia, one from last week, where they look at, again, non-immigrant worker visas and whether non-immigrant workers fell within the zone of interest to be protected under certain provisions of the INA.

What that Court held in Hispanic Affairs Project v. Perez, which is in line with the Southern District of Texas decision that we cited in our reply brief, was that many conditions of the INA are designed to protect American workers and that none of the foreign plaintiffs who are here -- coming

in here as non-immigrant workers are within the class of the protection of the INA provisions and, therefore, they may not seek relief under of the APA.

We think that there is nothing in the declarations that gets around this problem and, therefore, I guess deciding if whether they have prudential or non-prudential standing is sort of outside what was intended by these regulatory and statutory provisions. The same cannot be said about the petitioning companies.

THE COURT: Before we get to the companies, I'm not familiar with the Hispanics Affairs Project case. What was the date it was issued?

MR. PRESS: It was issued last Friday, September 9, 2016.

THE COURT: By the D.C. Circuit?

MR. PRESS: By the District Court for the District of Columbia. I can provide you with the Westlaw citation if that would be more helpful.

THE COURT: That's fine. What is the Westlaw citation?

MR. PRESS: It is 2016WL4734350. That was in the context of H-2A workers. It cites the case law we cited to in our reply brief, but it very much keeps in line with the arguments that we make in our reply brief regarding zone-of-interest analysis.

THE COURT: Let's just stay for a while on the individual plaintiffs for zone of interest. I have read your Southern District of Texas case, the Khalid case. But what about cases I have seen from other circuits, Mantena v. Johnson from the Second Circuit; Shalom Pentecostal Church from the Third Circuit; the Kurapati case. I am drawing a blank which circuit that was in.

MR. PRESS: The Eleventh Circuit.

THE COURT: The Eleventh Circuit. The Patel case from the Sixth Circuit. They seem to show zone-of-interest standing for individual beneficiaries. Am I missing something?

MR. PRESS: Yes, Your Honor. Those, again, are cases that are for immigrant workers or long-term permanent residents. When we discuss Abudu, on the constitutional standing argument in our reply brief, that sort of goes front and center that immigrant workers are in a different category.

The reason why this is important is that non-immigrant workers, such as the individual plaintiffs in this case, are here under H-1B visas and here for a finite period of time. LBRs -- immigrant workers -- they are not here for a finite period of time. Of course, they can leave if they like. If they violate certain laws, they are subject to deportation after that. But immigrant workers, long-term permanent residents, that's a much farther step along the process than the individual plaintiffs in this case.

Although the individual plaintiffs in this case might wind up pursuing LBR status years from now, we're not there yet. The whole system of H-1B, as Congress decided, was to create temporary visas for temporary non-immigrant workers. So really we are talking about apples and oranges when we are comparing those two.

THE COURT: I see. All right.

Let me turn to plaintiff then and ask you to respond just to the zone-of-interest argument with respect to individual plaintiffs. Then I will go back to defendants and have him talk about the zone-of-interest argument with respect to employer-plaintiffs.

Mr. Renison.

MR. RENISON: Yes. Thank you, Your Honor.

With respect to the zone of interest, I think it is important to look at, first of all, the statute at issue here, which is 8 U.S. Code 1183(g)(3). The other relevant section is (g)(1) -- you know what, I am sorry. It is 1184. I wrote it wrong. So that's 8 U.S. Code 1184(g)(3) and 1184(g)(1). (g)(1) contains the numerical restrictions, but (g)(3) sets out the filing date order consideration for an alien who files first. So they get visas or status first if they file before later filers.

It is (g)(3) and not (g)(1) that protects individual aliens against something other than an orderly distribution of

limited visas. It is (g)(3), not (g)(1) that protects against a lottery system. And it protects the individual aliens.

One more thing that is relevant to that is a provision that is just a few more down the line from that, which is 8 U.S. Code 1184(g)(7). That provision says that any alien who has already been counted within six years isn't counted again.

The significance of that is that the H-1B number is assigned to the individual alien, not to the employer. So let's say employer A petitions for an H-1B, and they get that H-1B worker. But then that H-1B worker wants to work for company B. They can do so; company B will have to file a petition for them. But they can go over to company B with their H-1B number and take it with them. Company A can say nothing about it, and they lose the number. They don't get to go back and say we need another number because we lost our worker.

It is alien specific. The (g)(3) section does really protect -- it protects against this lottery system, and it protects the alien, not the employer.

Of course, you need an employer to petition. But you also need an employee to say, "Yes, I want to take the job." So you need both of them. I think both have standing. That's why both petitioners here, you know, their employers are there. Their employees are there. So that's an important distinction

in the statute.

As far as the Hispanic case that was just mentioned involving H-2A workers, I think that's actually significant in that in an H-2A case, and that can be H-2B or H-2A -- it is a different category, but it is also a non-immigrant visa, just like in H-1B. H-1B cannot be filed without a listed intended beneficiary, which is completely unlike the H-2A or H-2B category, which allows the listing of unnamed beneficiaries.

So, for example, an employer can list 100 unnamed beneficiaries on an H-2A or H-2B case. If the person doesn't get their visa, they can move on to a new unnamed person. So this is really completely different from the situation of an H-1B.

Now, with regard to the length of time that someone is in the United States, I think it really just comes back down to what is an injury that is cognizable under Article III and under prudential considerations. Drawing the line as immigrant versus non-immigrant is a simplified, and it is not a good line to draw because you can have an H-1B come into the United States for three years, work three more years, for six years total. There are also provisions allowing them to extend that beyond the six years if they have an immigrant petition begun for them.

This is actually more time than even a conditional permanent resident who is given just two years, such as the

EB-5 immigrant investors or a spouse of a U.S. citizen. So while it is possible for those conditional residents to remove the conviction, if they don't, they are no longer a permanent resident, and that's a two-year period.

These individual plaintiffs, they've lost the opportunity to be in line for one of these H-1B visas. They have lost many years of wages that they could be potentially earning. In the case of Mr. Sinienok, which is one of the named plaintiffs, his offered wage was 90,000 a year. So that's $270,000 over a three-year period. That's not insignificant.

Some of these people, including Ms. Xiaoyang Zhu, must either leave the U.S. or return to school at great expense. So it is an injury. Just like many of the other class members have outlined in their declaration, including Ms. Leung, who has lost the lottery for three years, and she is unable to have an H-1B number that she could use to freely move between employers.

So losing a place in line for one of these visas is an injury because you are not assured a visa if you are just prepared to wait. You have to get lucky in the lottery. (g)(3) protects against that. It protects the individual, not the company. That's what I would have to say about the individuals

THE COURT: All right. Thank you.

Let's go back to Mr. Press. If you want, you're welcome to do a reply or rebuttal with respect to your argument on zone-of-interest standing for individuals. Then whenever you're ready, you're welcome to move on to zone-of-interest standing for the employer-plaintiffs.

MR. PRESS: Thank you, Your Honor.

Very briefly on the zone-of-interest standing. Plaintiffs' counsel does directly cite to 1184(g)(3) and focuses on the word "aliens," which is the first word of (g)(3). He neglects to talk about how the remaining words in that first clause of that paragraph are, "who are subject to the numerical limitations of paragraph 1," which refers right back to our argument that the caps exist. The reason they exist is to protect the American workforce, not non-immigrant workers that want to come over here for an unlimited period of time and make $90,000 when an American worker might be able to fill that spot for an organization him or herself.

The reason why the caps are there and the reason why the remainder of the language in (g)(3) is there is not to protect individual beneficiaries. It is to protect, at best, the petitioning companies, and the caps are there to protect the American workforce. It is a balance.

Now, with respect to the argument of there is no real distinction between immigrant versus non-immigrant workers, I can tell you, and I think Your Honor would understand this very

clearly, Congress takes immigrants who are here under a green card, they take that very seriously, because when you have a green card, you have a pass to citizenship. When you are not here with a green card, and you are a non-immigrant worker who is here for a finite period of time, that path does not exist.

It is very clear that Congress takes that very, very seriously. It is an extremely debatable point, a policy point right now. It is not for the courts to get involved to muddy that order that Congress has tried to demarcate here with eliminating 1184(g)(1) and (3).

With respect to the argument regarding (g)(7) and the allocation of a number with each petition, that is to help, again, the petitioning companies keep their records straight rather than the individual beneficiaries. The language is there, if they submit another petition -- it is there to help a company track those positions. It is not about individual non-immigrant workers.

The process cannot begin without the employer, and they're the ones who put that in. Now, a lot of what opposing counsel has discussed relates to constitutional Article III standing and injury. Although we feel that our arguments are based on solid case law against constitutional injury, in fact, at least with respect to how the plaintiffs had originally pleaded, the individual plaintiffs had originally pleaded, we do note that there is a big difference between zone-of-interest

standing and constitutional standing.

Just because someone may be inconvenienced a while, that may be enough arguably for Article III standing, that's not the same thing as a zone-of-interest analysis. That's why courts who are actually looking at these issues are making that sort of demarcation between, as Your Honor noted, in Shalom Pentecostal's recent decision in Hispanics Affairs Project. There's a real distinction. It shouldn't be muddy as opposing counsel is seeming to suggest.

THE COURT: I am going to study this issue of zone-of-interest standing for the individual plaintiffs more closely, but there really doesn't seem to be a strong argument that there is not zone-of-interest standing for the employer-plaintiffs, is there?

What your argument comes down to is redressability and mootness, but the employers are within the zone of interest; am I correct?

MR. PRESS: That's absolutely correct. We are not making any argument to the contrary.

THE COURT: All right. Then let's talk about your standing challenge to the employer-plaintiffs.

MR. PRESS: Okay. Quite simply, if you look at the declarations that each of the plaintiffs has filed, they request in their complaint declaratory injunctive relief. They essentially want for Your Honor to force the agency to create a

line, and they want a place in that line. I think they have been very clear about that with their complaint. I think they are very clear about that in their opposition to our motion.

But they are not alleging future injury, which would support the relief that they are now seeking. Given that the fiscal year is -- we are really less than a month away. We are a few weeks away from the current H-1B lottery winner beneficiaries coming over here and those visas becoming online.

If Your Honor would create a line, certainly going back to 2014 and certainly for everyone, as plaintiffs are making punitive class claims, that would create -- No. 1, it is asking for relief that's purely in the past, and that simply can't be given because those numbers have been exhausted. Even for this fiscal year, we're in the eleventh hour right now.

Giving plaintiffs the relief that they seek with the numbers basically exhausted at this point, in terms of how they allocate and how they conducted the lottery, that would be, we feel, greatly unfair. What they are actually asking for would be for Your Honor to stop the issuance of those visas right now within basically two weeks from coming online and to start the process over so a new line could be formed. Once we create that new line, then on a rolling basis everything will be hunky-dory for them.

THE COURT: Mr. Press, that's not the way I read their complaint. In a few minutes we will hear from

Mr. Renison, and I know you are not done. But let me just tell you how I'm reading it. One of the things they are asking for is prospectively -- going forward for fiscal year 2018. They don't want to be constantly subject to the risk that they may or may not be winners in the lottery. They want the lottery process eliminated. They want to be able to hire these particular employees that the employers want to hire, and they want at least the knowledge that, depending upon where they fall within the line, they will either get to hire the people they want sooner rather than later, or worst-case scenario, later rather than sooner, but they will have the certainty of knowing that eventually they will be able to hire the people they want because of a first come/first serve place as opposed to constantly being under the risk that they may or may not win a lottery.

Let me just briefly ask, Mr. Renison, do I understand that aspect of your requested relief correctly?

MR. RENISON: Your Honor, I could have stated it better.

THE COURT: Okay. So if that's the requested relief, Mr. Press, why isn't that at least redressable? By the way, don't nobody mistake, I'm not ready to opine on the merits. If we get to the merits, we have a lot more briefing and a lot more argument. But that's what they are asking for. And if they are legally entitled to that relief, essentially what they

are asking for is they want certainty rather than risk.

Mr. Press.

MR. PRESS: Understood. The fundamental problem is that they, in the declarations they've submitted within the last week, have never stated that they are going to submit an application again.

THE COURT: Well, that's pretty easily fixable. I'm not quite sure I agree with you, but that's at least not implied. But even if that is correct, that seems pretty fixable.

Mr. Renison, do your employer-clients intend to submit applications for fiscal year 2018 for these employees and for these positions?

MR. RENISON: Yes, Your Honor. In fact, I think it is stated clearly. If it isn't, it can be. But I believe it is stated clearly that the requested relief is to resubmit the rejected petition and not have to resubmit a new one.

THE COURT: I also don't think that makes a whole lot of difference. Even if you had to submit a new one, as long as going forward you were not subject to lottery, then that's part of the relief that I think you would be asking for. Maybe you would prefer not to have to resubmit. But even if you do, that would solve your problem.

Am I correct?

MR. RENISON: Yes, Your Honor. That is

essentially -- we're requesting the ability to resubmit a petition. But if it were an opportunity to submit a newly prepared petition, that would redress the harm. The only thing that might be different is that some of the class members have submitted petitions in prior years and really should have precedence over those who file later. It really comes down to the date order. But whether it is resubmitting, as we've requested, or having the opportunity to submit with a priority date, either one, we are getting more than the risk associated with the lottery.

THE COURT: I understand. Let me just tell you analytically how I'm approaching the pending motion to dismiss, because I think for standing purposes I cannot and should not consider any of the putative class members. We first have to figure out do the existing named plaintiffs have standing? If they do not have standing, it does not matter whether some putative class members may or may not have standing.

So Question No. 1 for me on this motion to dismiss is, do the named plaintiffs, the two employer-plaintiffs specifically, do they have standing? I'll also consider the named employee-plaintiffs. But for purposes of the motion to dismiss, I'm not considering the putative class members. If I were to deny the motion to dismiss, then I think the next step would be to decide whether we go to summary judgment first or whether we go to class certification first. But for right now,

for purposes of the motion to dismiss, I am not considering any of the putative class members' possible positions.

I will give you a brief opportunity, Mr. Renison, to try to talk me out of it if you think I'm wrong, but I don't think I'm wrong. How is that for putting pressure on you?

MR. RENISON: I believe you are correct there. If I may, the declaration -- may I speak to a declaration that does speak to the resubmission?

THE COURT: Please.

MR. RENISON: Declaration/Document No. 22, Declaration of Per Casey.

THE COURT: He is the president of Tenrec.

MR. RENISON: He is the president of Tenrec. On page 3, paragraph 9, it is stated, "On behalf of Tenrec, Inc., I support the request in this lawsuit to have the option to resubmit the petition that was filed by the company on behalf of Mr. Sinienok for a priority date."

THE COURT: That's what I thought. I didn't recall that's where it was, but I recall seeing that somewhere.

So I do think, Mr. Press, that they have adequately pled that it is their intention to resubmit their petitions and all they are seeking now -- not all -- but one of the things that they are seeking as part of their relief is the opportunity to get in line and get some certainty, even if they have to wait, as opposed to constantly repeated participations

in a lottery and the risk that that entails.

Let's move on from that point. I think they have pled that requested relief.

MR. PRESS: Your Honor, if I might, very briefly.

THE COURT: Sure.

MR. PRESS: With respect to the petitions that were filed in April of this year, and certainly with respect to the other putative class members' past petitions, the problem with that is essentially that the ship has sailed on those. More specifically the problem is that in those applications, the one that was filed April 2016, rather than having to resubmit for April 2017, if you just accept what they submitted earlier this year, the problem with that is the labor condition application will be stale at this point. That's because there has to be -- there is a adaptation in these applications as to what the correct prevailing wage was at the time.

Now, as Your Honor I'm sure understands, those prevailing wages change with those dates. Using the 2014 application, which Mr. Renison has proposed, we would certainly be using old-wage adaptations. The same thing would apply to the application that Tenrec submitted this year.

THE COURT: Mr. Press --

MR. PRESS: Getting the agency to accept stale prevailing wage certifications sort of creates this problem when they are analyzing each of the applications they are

looking at as to whether they are adequate under the prevailing statutes and regulations. Certainly with the prevailing wages, we don't want to incentivize employers to have non-immigrant workers come into the country and pay them less than the prevailing wage, because that would keep wages down arbitrarily for the entire American workforce while that is, of course, exacerbating the American workforce employment.

THE COURT: Mr. Press, I understand what you are saying. Maybe I compartmentalize things too much, but I don't think so. What I'm hearing from you is an argument that may or may not be strong; it may or may not be valid; that may go to why, even if the plaintiffs are right on the merits, they shouldn't get that particular avenue of relief. It may be an argument why we shouldn't certify a class. That's fine. We will get there if and when we have to get there.

But right now we're just talking about a motion to dismiss arguing lack of subject matter jurisdiction. Specifically with respect to the employer-plaintiffs, are their grievances redressable? What I'm hearing that argument you've just made tell me is, well, they may not be redressable in the specific alternatives that plaintiffs are proposing in that respect, but at least with respect to one avenue of plaintiffs' requested relief; namely, prospectively going forward for fiscal year 2018, they don't want to have to be subject to the risk of a lottery. They want to be able to get online and know

that eventually they will get their employment needs satisfied if they submit a timely and complete petition with up-to-date wage information and everything else that's required.

Well, maybe that might be the only relief that they would be entitled to if they even win on the merits. But at least that does seem to satisfy the redressability hurdle, and all of your other arguments would either go toward why they shouldn't be entitled to other forms of requested relief, maybe why they shouldn't be entitled to class certification, but I think they have satisfied the redressability prong of standing.

Am I missing something?

MR. PRESS: But if they could -- I want to be very clear, my client, the agency, does not have these applications anymore. What happens is they literally do not receive them after the statutory caps and the lotteries have been completely conducted. The documents that my client has is evidence that that application was submitted, but they don't have the application.

THE COURT: All right.

MR. PRESS: So for these plaintiffs in particular, even the organizational ones, they need to resubmit those applications. For them to have truly just injuries now in this fiscal year, what the plaintiffs are essentially asking for would create chaos to use that old application and create a line right now.

Now, you are certainly correct with respect to fiscal year 2018, if they conclude their complaint, not just that they support to have the option to resubmit, which is what's in paragraph 9 of Per Casey's declaration, but that they are going to resubmit, then they have standing for injunctive and declaratory relief under Ninth Circuit case law. They don't have that in the complaint. They don't have that in the declarations.

THE COURT: Mr. Renison, is it your employer-plaintiffs' intention to resubmit?

MR. RENISON: Yes. On all counts, yes.

THE COURT: Okay. Well, then maybe procedurally we need to grant leave to amend the complaint for the plaintiffs to allege that, but it does sound like once they have alleged that, they are going to have standing.

MR. PRESS: We would agree, Your Honor.

THE COURT: Okay. Then I think that takes care of that.

I need to figure out whether the employee-plaintiffs have standing, but we know that the employer-plaintiffs will have standing, because I'm going to give the plaintiffs leave to replead.

All right. Is there anything else that we should talk about now other than maybe map out a chronology how we go forward? What else do we need to talk about now other than the

plan for going forward?

Anything further, Mr. Press?

MR. PRESS: Not from us, Your Honor.

THE COURT: Mr. Renison?

MR. RENISON: No, Your Honor.

MR. PRESS: Actually, Your Honor, I'm sorry. I have forgotten. With respect to the current motion for class certification and summary judgment, if Mr. Renison takes Your Honor's cue, if you do grant leave to amend, we would request that the motions for summary judgment and class certification sort of correlate with the new amended complaint alleging that they intend to resubmit these applications, for example.

THE COURT: I understand.

All right. So I think the right way to proceed is for me to decide the pending motion, and I'll tell you right now that the easy part of it is, with respect to the employer-plaintiffs, the minimum I'm going to say that the plaintiffs have leave to replead to allege that, among other relief, and I'm not going to right now preclude the plaintiffs from seeking whatever relief they choose to seek. They may or may not get it down the road, but now is not the time to decide that.

But I'm certainly going to allow the plaintiffs to replead with respect to the employer-plaintiffs that they

intend to resubmit their applications for the 2018 fiscal year, and if they do, then they have standing. I probably also need to decide relatively soon whether the employee-plaintiffs are within the prudential considerations of standing, the zone-of-interest standing. By the way, I really do think that they satisfy Article III standing. I don't even think that's close. But with respect to the zone-of-interest and prudential standing, I will take a further look at that.

If they do, then so be it. They probably then also should be repleading that if they are eligible, or as they put in their declaration, if the employers get permission or if they get the visas that are sought, that they would intend to accept the positions for which they are seeking, and they put that in the amended complaint.

So I'll try to get an answer on that question to you all. I think I can be able to do it by the end of next week, a week from Friday. We will get you our decision. Then I'll give plaintiff two weeks to file an amended class action complaint. Then we move forward, and we will then talk about whether we proceed with plaintiffs' summary judgment or with class certification next.

I'll tell you my initial thinking on it now so both of you can think about it, and you're welcome to share with me your thoughts now or later. But my reaction is we probably should deal with cross-motions for summary judgment before we

tackle the issue of class certification, because the real guts of the question here, as I see it, is whether or not the current procedures employed by the U.S. Citizenship and Immigration Services does or doesn't violate the statutory directive of first come, first served.

I think that's the guts of this issue. If it doesn't violate that statute, we're done. We don't need to deal with class certification. We don't need to deal with the question of remedy. But if it does violate it, then we need to deal with, well, what's the right remedy going forward for these particular plaintiffs? Is it prospective only, as I have been describing in this call? Is there a component that's retroactive? As I'm hearing Mr. Press argue, it is just not possible, and usually courts don't order the impossible, or at least when they do, they don't have a very successful time implementing that order, but we will see.

And we will also be in a better position to evaluate whether there is any point to class certification; whether it will really accomplish anything that would not otherwise be accomplished by purely prospective relief.

And then finally, the other comment that I want to add right now, and then I'll turn it over to you, if somebody wants to say something, I have been giving some thought to this ultimate question of whether or not the current procedures employed by Citizenship and Immigration Services does or

doesn't violate the statutory directive.

Here, I want to make sure that both parties, when you get around to briefing this and arguing this before me, really give me the current state of the art of the U.S. Supreme Court's analysis and methodology of how to interpret statutes. Interpreting statutes isn't that easy. Obviously we know from a few years ago and more recent cases than just these two, but the Supreme Court's decision in 2012 that upheld the constitutionality of the Patient Protection and Affordable Care Act. That's the decision of National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566. That's the 2012 decision.

That decision, although it has plenty of dissents, that decision is the Supreme Court telling us how we should go about interpreting congressional statutes. Even last year we saw from the Supreme Court in the case of Yates v. United States. That's the Justice Kagan decision, "One Fish Two Fish Red Fish Blue Fish," a fish is not a tangible object. That's 135 S.Ct. 1074, decided February 25th, 2015, and there are other cases from the Supreme Court.

So I just want to make sure, as we struggle with the question of whether or not the U.S. Citizenship and Immigration Services' current regulations correctly interpret and apply the statute or are inconsistent with the statute, we look at not only the question of deference to an agency interpreting a

statute, the Chevron deference, but we also make sure that we interpret the statute in connection with the most current thinking from the U.S. Supreme Court that obviously binds this District Court.

So that's why my tentative thinking is -- first of all, the motion to dismiss will be denied. Some portion of this case is going forward, even if it is just the employer-plaintiffs. Then my tentative thinking is, we probably should deal on cross-motions for summary judgment on the $60,000 question, the main question of whether or not what the agency is doing does or doesn't violate the statute.

Maybe we will leave remedy aside for now and just deal with that question, because, as I said, if it doesn't violate the statute, I think the dispute is over. If it does violate the statute, then we will brief and discuss what's an appropriate remedy prospective, prospective plus retrospective, individual plaintiffs, or individual plus class. And we will tackle those issues later.

But I tend to approach it sort of one question at a time in what is a hopefully a logical and reasonable order. That's my tentative thinking.

Does anybody want to be heard on any of that or anything else at this time? I'll start with counsel for plaintiff and then move to counsel for defendant.

Mr. Renison

MR. RENISON: Thank you, Your Honor.

I have no particular comments other than there is perhaps the request from defendants to conduct some discovery, and I don't know, in light of this motion, whether they will still seek that. That was in connection with the class motion, which is in order going to be considered last. I just want to thread the issue because the Government has asked for some kind of discovery.

Our concern is simply that we have enough time before we are subjected to the lottery again. I do want to speak to this just briefly because I feel there is some conclusion from the briefing that I think maybe that the Government has with regard to our remedy. It is clear to me that in cases where numbers of visas are numerically limited -- through reading other cases -- that once those visas are allocated, even if they are allocated incorrectly, they are gone.

They have already allocated all of the 2017 numbers for fiscal year 2017. But we have a chance having an orderly distribution of this fiscal year 2018 numbers, which if we are into April, the notices that our plaintiffs received was, "Yes, please submit your application again on April 1st," at which time it is highly likely there is going to be a lottery. I can't see that there won't be one, with the bar chart of numbers of petitions in the hundreds of thousands. So I'm worried about the time. That is my only concern, is the time

and the request from the defendant to do discovery on the class.

THE COURT: Well, with respect to the latter point first, and I'll turn to Mr. Press in a few minutes. If the parties want to conduct discovery on something, and my practice is, in the first instance, discuss it among yourselves. If both sides can agree, then fine, you don't need Court intervention. If there is a disagreement, if someone wants the Court to either order discovery or order that discovery be suspended or abated for a period of time until something else happens, by all means come contact the Court, and I will hear your dispute and make a ruling.

By the way, both sides are free to contact my courtroom deputy, Mary Austad, by e-mail any time you can't resolve something. Now, you have to first confer, and if you confer and can't resolve it, that's what I'm here for. So contact my courtroom deputy probably by e-mail, copy the other side, and let her know that you need the Court's assistance.

We will probably ask for some brief -- not a brief -- but we will ask for a relatively succinct explanation, probably in an e-mail, what the dispute is. Then we will get on the telephone and talk our way through it. If I can resolve it in that fashion, fine. If you think it is more appropriate to file briefs, just tell me, and I'll give you leave to file a brief.

By the way, related to that, no motions to compel may be filed without prior leave of court. The way you get prior leave of court is by contacting the courtroom deputy and scheduling a conference with me. It will probably be by telephone. So work out the discovery issues yourselves. But if you don't reach an agreement, by all means let me know what the dispute is, and I'll resolve it for you.

I also tend to resolve things relatively quickly, relatively efficiently. So with respect to your first point, Mr. Renison, it is now mid-September. I will get you a decision on the motion to dismiss probably by the end of next week, so figure in about ten days or so, or less. Then you will have ten days to file your amended complaint. But then maybe the right thing to do is get on the phone again and put together a schedule going forward.

I still think the right thing to do is to have cross-motions for partial summary judgment on liability questions only; namely, the cross-motions on how to interpret that statute and whether that statute does or does not conflict with what's currently being done. That's partial cross-examinations for summary judgment. If those are filed, frankly, talk among yourselves after this call when you want to do it, but if you all file those sometime in early October, maybe we will have responses by the end of October or early November, replies by mid-November or the end of November. We

can have an oral argument on that in December.

I will assure you that I will give you a decision no later than 60 days after oral argument, and, frankly, what I typically do is within 30 days of oral argument. It depends how complicated the dispute is and how busy I am. But you will get a decision from me within 30 to 60 days. In any event, worst-case scenario under this schedule, you will be getting your decision by January or February of next year.

Now, I know that's only on liability issues. Assuming plaintiff wins, and by the way, don't read anything into that, because obviously if plaintiff loses, then we're done, and plaintiff can appeal my decision. But if plaintiff wins, then we will have to talk about relief, maybe even preliminary injunctive relief. Maybe we will move straight and quickly and efficiently to final injunctive relief. It depends on how we fit in the class certification issue.

But don't forget, Mr. Renison, whatever I do is not the end of the story. Even if I rule in your favor and whatever injunctive relief I order, defendant is going to have their right to appeal to the Ninth Circuit. And if they lose there, they will have the right to petition the Supreme Court. Obviously if defendant wins, you will have the right to petition to the Ninth Circuit and petition for cert. to the Supreme Court.

So I'll move as reasonably efficiently as we can.

Assuming that you all can brief things efficiently, I'll issue decisions efficiently. I think that should take care of the scheduling issues that you raised, Mr. Renison, as much as realistically one can expect, unless you decide you want to file a motion for preliminary injunction, but I think it is a little premature for that, at least at this time.

Let me turn to Mr. Press to see if you have any comments, and I will go back to Mr. Renison for any further thoughts.

MR. PRESS: We are fine with what Your Honor has outlined, that approach. It doesn't present any problems for us.

THE COURT: Any further thoughts, Mr. Renison?

MR. RENISON: Only to clarify, Your Honor. There is a current order holding in abeyance any discovery until the decision on the motion to dismiss. Shall the parties wait until after the decision is issued to engage in discovery?

THE COURT: What would you all like? Any preference? By the way, I'm still having a hard time understanding what discovery is needed, at least on the liability side of this, without considering class certification.

What would you all want? It is fine with me to lift that order right now. It is fine for me to let it stay until next week.

What do you all want?

MR. PRESS: Your Honor, if I might, for the defendants, we only want discovery with respect to class certification and those issues, specifically the adequacy. We want to know more about the organizational plaintiffs. Of course, if Your Honor allows for the individual plaintiffs, we will want to know more about them in terms of the adequacy to represent the class. If we never get to that issue, then we don't have an inclination to take discovery along the lines.

We definitely agree with you, that considering that this is a typical APA case in this posture right now, the normal procedure is to not allow for discovery and just proceed on the record. Now, what constitutes the record in this case, if Your Honor would like some of the comments and things like that, things that were considered in terms of putting together the 2008 regulation, we could try to do that. Or if it is simply the record, i.e., the applications that the organizational plaintiffs submitted to USCIS, we can proceed on that. It sounds like from Your Honor's comments, given the file date and this is a statutory interpretation case, if you don't feel like you need any record, that's also fine for us.

THE COURT: Sure.

Mr. Renison, what's your view? You have heard that I really think -- and I could be missing things, and I'm certainly open to what you both have to say. But I think it is a statutory interpretation case; that is, does the way that it

is currently being operated violate the statute?

I don't think that we need an administrative record. I don't see how that would help us. I also don't see how fact discovery would be relevant to that.

What do you think, Mr. Renison?

MR. RENISON: Your Honor, I don't think there are any facts that would be drawn out in discovery at all for any of the motions. It is purely just trying to get what the Government would like as soon as possible so that they are satisfied with their request.

THE COURT: Okay. Well, it sounds like if the Government wants to take discovery from the individual named plaintiffs, it doesn't sound like you are going to oppose. Whether the Government does or doesn't want to take that discovery right now, I'll leave it up to them. I'm not going to order them to take discovery right now if they don't want to. But it sounds like if they want to, you are not going to oppose that, so we don't have a problem.

What about the issue of an administrative record? I know this is to some extent governed by the APA. Do you think there needs to be any type of administrative record lodged?

MR. RENISON: Well, Your Honor, I don't think an administrative record is necessary for the disposition of any of these motions. I provided a copy of what was filed and was sent back to us to the other side as part of the declaration on

each of the organizational plaintiffs representatives. We included a copy of the rejection notice in the filing. So from my perspective, it is really statutory interpretation and does not have to have any kind of record.

THE COURT: So if I'm hearing both sides correctly, both sides agree that there is no need for any further lodging of any administrative record.

Now, one thing I'll suggest, maybe in the interest of moving this along and being efficient, do you want to agree on a deadline and maybe even a briefing schedule for cross-motions for partial summary judgment on questions of liability? We will get the amended complaint received here in due course, and you will know in about a week and a half whether it should or shouldn't include individual employee-plaintiffs, but that's not really going to matter to the underlying legal question.

So shall we put together a schedule right now for both sides to file cross-motions for partial summary judgment on liability issues? By "liability issues," that means question of whether or not the current practice of the defendant does or doesn't violate the relevant statute. Should we set that schedule now?

MR. RENISON: Yes. Your Honor, plaintiffs would like to have a schedule set. In terms of the time to file an amended pleading, I would only need a week after the decision.

THE COURT: Okay. Then I'll give you one week after

the decision.

Let me get my calendar open here. If we assume you get a decision no later than 9-23, we will have the second amended complaint due 9-30. So let's assume that comes in. When would you all propose would be the right time to file cross-motion for partial summary judgment?

MR. RENISON: Your Honor, from our perspective, I have already prepared and filed a motion for summary judgment that can be prepared in the manner in which you have directed relatively quickly. So any time is fine with me. I think it might be the Government's call on that.

THE COURT: By the way, to keep things clean, what I would like to do, just to keep our records clean, I would like to deny without prejudice plaintiffs' motion for summary judgment, Docket 11, and deny without prejudice, Docket 10, the motion for class certification. So we will get to those when we get to those. But at least right now it is not going to show up on our docket system as pending motions that haven't been fully briefed, let alone decided.

Any objection to that, Mr. Renison?

MR. RENISON: No, Your Honor.

THE COURT: Thank you.

MR. PRESS: The Government doesn't object to that either, Your Honor.

THE COURT: Very good. Thank you, Mr. Press.

When, Mr. Press, do you think the Government would be prepared to file its cross-motion for partial summary judgment on liability issues? What I'm envisioning, by the way, is each side will file their motion for partial summary judgment on liability. Then at some appropriate time after that, each side will respond. Then at some appropriate time after that, each side will reply, and then we will have oral argument.

So when do you think would be a reasonable time, Mr. Press?

MR. PRESS: Well, without having seen the amended complaint, I don't want to say that we will not file another motion to dismiss under Rule 12. I think given Mr. Renison's position that he has already filed the motion for summary judgment, we agree with that. We have seen it. We have looked at it. Would three weeks be okay?

THE COURT: That's fine with me.

By the way, you are welcome also to file motions to dismiss or partial motions to dismiss, but I would also like to keep moving on getting the ultimate legal question resolved.

So if the second amended complaint is filed on September 30th, three weeks after that is October 21st. So will that work for everyone filing partial motions for summary judgment, October 21st?

MR. PRESS: Yes.

MR. RENISON: Yes, Your Honor.

THE COURT: What we normally do in this district, we have three weeks for responses for summary judgment. That would be November 11th.

Will that work for everyone for responses?

MR. PRESS: Is that a holiday?

THE COURT: Yes, it is. Sorry about that.

Do you want the following Monday?

MR. PRESS: Yes, Your Honor. As a government employee, we take those days very seriously.

THE COURT: No comment. But that's fine. You can have Monday, even if you don't take them seriously.

Responses due on November 14th. Then two weeks afterwards for reply will be November 28th. I can't do that to you. That's like the Monday after Thanksgiving. So let me give you until Friday. How about replies due December 2nd.

Is that fair?

MR. PRESS: Yes, Your Honor.

MR. RENISON: Yes, Your Honor.

THE COURT: And then let's take a look when we can do an oral argument. I generally like to give myself at least two weeks. I think the week of December 19th will probably work for us.

How are you looking on the week of December 19th? Friday is the 23rd.

THE CLERK: That's a court holiday.

THE COURT: Do you want to do oral argument on Monday, December 19th?

By the way, I try to give myself the week off between of Christmas and New Year's in case I do some family vacation time. So we can do oral argument that Monday or Tuesday, the 19th or 20th, or in early January.

Do you want the 19th or 20th?

MR. RENISON: I would prefer December 19th.

MR. PRESS: That's fine for the Government as well, Your Honor.

THE COURT: Monday, December 19th, for oral argument. I'm assuming you want to do it in person as opposed by phone?

MR. PRESS: Yes, Your Honor.

THE COURT: So what's better for your travel? If we do it in the morning, obviously you'd travel out here on Sunday, the 18th, but then you can get out of here in the afternoon. It is not that hard getting out. Do you have any preferences, morning or afternoon? I will give you whatever you want. If you want, I'll even give you Tuesday morning, so you fly out on Monday.

MR. PRESS: Whatever is most convenient for opposing counsel and the Court. As far as I'm concerned, Portland is beautiful even in the winter, so whenever it is convenient.

THE COURT: All right. Any preference, Mr. Renison, morning or afternoon?

MR. RENISON: The afternoon would be preferrable.

THE COURT: Okay. Let's set oral argument for Monday, December 19th, at 2:00 p.m. This may be complicated, so if you need to, Mary, let's not set anything else that afternoon.

Okay. Then I think we have that scheduled. We will issue a minute order on these issues.

Is there anything else that anyone would like to address in this call? I will start with plaintiff, Mr. Renison.

MR. RENISON: No, Your Honor. Thank you.

THE COURT: Thank you.

Mr. Press.

MR. PRESS: Only with respect to discovery, I want to make it clear, we were only interested in pursuing discovery for the class claims. We consider that to be a very narrow issue for discovery. We don't want discovery outside of that. Normally in APA cases there is no discovery whatsoever.

THE COURT: So it sounds like we're not going to be needing any discovery, at least from defendants' perspective, at least until we resolve this issue on the partial summary judgment on liability questions.

MR. PRESS: That's correct.

THE COURT: Okay. That's fine.

As I said, though, if either of you need anything

from the other, confer with each other. If you reach agreement, whatever you choose to do will be fine with me. If you can't reach an agreement, contact my courtroom deputy, and I will be glad to intervene and help. I think that takes care of everything for today. We will get a minute order out.

Thank you very much.

COUNSEL: Thank you, Your Honor.

(Recess.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca April 28, 2017
DENNIS W. APODACA, RDR, RMR, FCRR, CRR DATE
Official Court Reporter

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